THE BONN CONSTITUTION AND THE EUROPEAN DEFENSE COMMUNITY TREATIES

A Study in Judicial Frustration

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ON the same day, August 30, 1954, the European Defense Community succumbed in the French National Assembly,[1] a momentous legal controversy became a simultaneous casualty of the French refusal to ratify the EDC treaties.[2] While the failure of EDC, considered by the United States a major aim of its foreign policy, was accorded in this country the attention it deserved, the coincidental demise of the legal proceedings passed unnoticed by the American public. These proceedings had been instituted, in January 1952, before the Federal Constitutional Court in Karlsruhe against the coalition government of Chancellor Konrad Adenauer by its political opposition, the

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1. N.Y. Times, Aug. 31, 1954, p. 1, col. 8.

2. EDC was composed of three treaties: (a) the *Convention on Relations between the Three Powers and Related Conventions*, signed by the German Federal Republic, France, the United Kingdom, and the United States at Bonn May 26, 1952 [cited hereinafter as Bonn Treaty], which was designed to restore the sovereignty of Western Germany; (b) the treaty on *The Creation of the European Defense Community* signed by the German Federal Republic, France, Italy, Belgium, the Netherlands, and Luxemburg in Paris, May 27, 1952, [cited hereafter as EDC Treaty], which attempted the integration under supranational authorities of the military potential of the six signatories; and (c) the *Convention between the Member States of the EDC and the United Kingdom*, also signed in Paris, May 27, 1952.

The Bonn Treaty, a document of 225 pages in folio, had two annexes, one dealing with the assistance of the Federal Republic for Western Berlin, the other with the Arbitration Tribunal. Additional conventions were attached to it: *Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany*; *Finance Treaty*; and *Convention on the Settlement of Matters Arising out of the War and the Occupation*. The EDC Treaty, a document of 121 pages in folio, included eight protocols, dealing, among others, with military, financial, and judicial matters. Attached were various other treaty instruments, concerning, *e.g.*, the relations of EDC to the North Atlantic Treaty Organization and the relations of EDC to the United Kingdom.

The treaties, with all protocols and conventions, as signed by the Federal President March 26, 1954, are published in full in [1954] BUNDESGESETZBLATT, pt. 2, at 57-436. The English text of the Bonn Treaty, and an English translation of the EDC Treaty may be found in S. EXEC. Doc. Q & R, 82d Cong., 2d Sess. (1952). For a more accurate translation of the EDC Treaty see OFFICE OF THE UNITED STATES SPECIAL REPRESENTATIVE IN EUROPE, TREATY ESTABLISHING THE EUROPEAN DEFENSE COMMUNITY AND RELATED PROTOCOLS (1953).

German Social Democratic Party. The opposition contested the constitutionality of the treaties—and the conventions and protocols attached to them—under the provisions of the Bonn "Basic Law" (*Grundgesetz*).[3] This challenge produced a constitutional controversy rivaled in importance in recent German history only by the decisions of the Reich Constitutional Court of the Weimar Republic rejecting the claim for reinstallation of the Government of Prussia, which had been removed by a *coup d'etat* of von Papen's Reich Government.[4] The scars left on German constitutional democracy by the inconclusive termination of this legal dispute are perhaps more lasting, and of greater consequence to the United States, than the alleged damage European unity has suffered by the failure of EDC.[5]

During the life of the constitutional struggle, its significance escaped the American lawyer and political scientist because of the overriding political importance of West German integration into EDC. Now that German participation in the defense of the West has been accomplished, at least for the time being, by the replacement of EDC with the Paris Accords of October 23, 1954,[6] it seems desirable to summarize and evaluate some of the procedural and substantive issues before the Federal Constitutional Court.

Consistent with German procedural technique, the proceedings, extending over a period of nearly three years, consisted primarily of weighty briefs by the parties. Oral proceedings were as brief and intermittent as they were inconclusive. Briefs for the Government were drafted by the staffs of the ministerial bureaucracy, primarily the Federal Ministry of Justice. The legal burden of the opposition was carried Atlas-like by Dr. Adolf Arndt, a Social Democratic representative in the lower legislative chamber, the Federal Assembly, with the help of one legal assistant. In addition, some thirty opinions (*Gutachten*) were submitted to the Court by some of the most respected German constitutional and international lawyers.[7] Each of these briefs and

3. The Basic Law for the Federal Republic of Germany—the "Bonn Constitution"—was adopted at Bonn by a Parliamentary Council of sixty-five German political leaders on May 23, 1949. [1949] BUNDESGESETZBLATT, pt. 1, at 1. For a translation, see U.S. DEP'T OF STATE PUB. No. 3526, EUROPEAN AND BRITISH COMMONWEALTH SER. 8 (1949). The translations used in this article are those of the author.

4. Judgment of Staatsgerichtshof, Oct. 25, 1931, 138 Entscheidungen des Reichsgerichts in Zivilsachen, Anhang 1*.

5. See Loewenstein, *The Union of Western Europe: Illusion and Reality*, 52 COLUM. L. REV. 55, 209 (1952); Loewenstein, *European Union: Miracle or Mirage*, The Nation, Jan. 10, 1953, p. 26.

6. See text at notes 124-25 *infra*.

7. Practically all were Weimar-trained university professors, and the majority had taught under Weimar, retained their positions under the Hitler regime and continued to hold their chairs under the Bonn system. Two foreign experts wrote opinions (Professor Wehberg, Geneva, and the author). The briefs and opinions submitted in 1952, amounting to some 800,000 words, were published in two volumes, DER KAMPF UM DEN WEHRBEITRAG (Institut fuer Stantslehre und Politik, ed. 1952-53) [cited hereinafter as WEHRBEITRAG]. The material submitted in the years 1953-54, equally voluminous, is not yet available in print.

opinions were written with traditional German legal scholarship and emphasis on the general theory and the systematization of law, and with a full awareness of the historic implications of the controversy. In addition to domestic constitutional law and international law, both parties supported their arguments by exhaustive references to the constitutional theory and practice of the United States and other democratic nations. Indeed, comparative material was used to such an extent that one was almost able to discern the contours of a constitutional law common to all democratic states.

Yet this immense intellectual effort was for practical purposes entirely wasted. The Federal Constitutional Court never decided the issue of the compatibility of the treaties with the Bonn Basic Law on its substantive merits. As the controversy drew one governmental organ after another into its vortex—the Federal Government, the Federal President, both houses of the Federal Parliament (Federal Assembly and Federal Council)—the Court deliberately and consistently procrastinated until the negative vote of the French National Assembly relieved it of the duty of decision. In this sense the controversy is a case of judicial frustration for which a parallel can scarcely be found in modern legal history.

The proceedings fall into three distinct though interrelated stages. The first covers the petition of the opposition to the Court to enjoin the Federal Government from signing the treaties then under advisement and to declare that they were incompatible with the Constitution. The petition was rejected on procedural grounds on July 30, 1952.[8] The second stage, the so-called proceedings through legal opinion (*Gutachtenverfahren*), deals with the request of the Federal President for an advisory opinion of the Court on the constitutionality of the treaties. This phase was ended by the withdrawal of the President's request on December 9, 1952.[9] The final stage, in which the Court was not asked to participate, concerns the passage of an amendment to the Basic Law on March 26, 1954, which purported to remove the constitutional objections of the opposition to the treaties. But before further discussion of the action—or inaction—of the Constitutional Court, some understanding of the institutional organization of judicial review under the Basic Law is necessary.

Judicial Review under the Bonn Constitution

Under the Basic Law exclusive jurisdiction to determine whether federal —or state—law is compatible with the Constitution (*Normenkontrolle*) lies in a special court, the Federal Constitutional Court (*Bundesverfassungsgericht*).[10] Whenever any German judge entertains doubts as to the consti-

8. Judgment of Bundesverfassungsgericht (I. Senat), July 30, 1952, 1 Entscheidungen des Bundesverfassungsgerichts [hereinafter B.V.G.] 396; 1 WEHRBEITRAG 436.

9. 2 WEHRBEITRAG 811.

10. BASIC LAW art. 93(2). For a detailed description see Loewenstein, *The Government and Politics of Germany*, in GOVERNMENTS OF CONTINENTAL EUROPE 389, 585-90 (Shotwell rev. ed. 1952). For a historical summary of German judicial review from the Bismarck to the Bonn Constitutions see Nagel, *Judicial Review in Germany* 3 AM. J. COMP. L. 233 (1954).

tutionality of a statute which he must apply in the controversy before him, he is required to suspend the trial and request a decision of the Constitutional Court.[11] This same action must be taken by the court of last instance in non-constitutional matters, the Supreme Federal Court.[12] Judicial review is thus strictly separated from the jurisdiction of the ordinary courts and monopolized by the Constitutional Court. In addition, the Court is charged with numerous other judicial functions, including the determination of "disputes concerning the extent of rights and duties of the highest federal organ, or of other participants accorded independent rights by this Basic Law . . . ."[13] In practice such disputes may arise between the Government and the parliament, between the two houses of parliament, and between the Federal President and other federal organs. Most such disputes would be non-justiciable "political questions" in this country.

In conformity with Basic Law article 94(2), the Law on the Federal Constitutional Court, a complex federal statute of more than one hundred sections, was passed March 12, 1951,[14] to regulate the appointment, by elective procedures, of the justices and the internal organization of the Court. Basic Law article 94(1) prescribes only that the Constitutional Court shall consist of "federal judges and other members" and that one-half of the justices shall be elected by the lower parliamentary house, the Federal Assembly (*Bundestag*), and the other half by the upper house, the Federal Council (*Bundesrat*). The statute fixes the number of justices at twenty-four [15] and establishes elaborate precautions against political interests influencing the selection of justices: a complicated procedure of indirect election of justices is required in the Federal Assembly;[16] for those elected by the Federal Council a two-thirds majority is required.[17] Obviously, when parliamentary bodies have the power to make appointments, political considerations cannot be completely eliminated. Nevertheless, all of the justices elected are trained lawyers of recognized standing, among them some of the best legal minds of Germany.

The Law on the Federal Constitutional Court divides the court into two chambers — Senates — of twelve justices each, under the presidency of the Chief Justice and the Deputy Chief Justice respectively.[18] Section 13 distributes the jurisdiction of the Court, as defined by Basic Law, between the two Senates. Neither Senate can assume jurisdiction over a category of dis-

11. BASIC LAW art. 100.

12. *Id.* arts. 95, 100.

13. *Id.* art. 93(1) para. 1. See, also, *id.* art. 93(1) paras. 3, 4, 5.

14. *Gesetz ueber das Bundesverfassungsgericht*, Law of March 12, 1951, [1951] BUNDESGESETZBLATT, pt. 1, at 243 [hereinafter cited as Law on the Federal Constitutional Court]. The leading commentary on the statute is by one of the justices of the Court, GEIGER, GESETZ UEBER DAS BUNDESVERFASSUNGSGERICHT VOM 12. MAERZ 1951, KOMMENTAR (1952).

15. Law on the Federal Constitutional Court § 2(2).

16. *Id.* § 6.

17. *Id.* § 7.

18. *Id.* § 2.

putes assigned to the other. The First Senate, thus, has exclusive jurisdiction over disputes involving the compatibility of federal and state law with the Basic Law.[19] The Second Senate alone may hear questions regarding the interpretation of the Basic Law that arise in disputes between organs of the federal government.[20] The Court was duly constituted in 1951 in Karlsruhe.

CONSTITUTIONAL PROCEDURE AND POLITICS

The Preventive Injunction

Although the plan for EDC was originated by the French Government in 1950 and closely followed the pattern of the Schuman plan for the merger, under supranational authorities, of the coal and steel potential of the six western European states—at that time still in the preparatory stage—drafting the EDC Treaty proved immensely difficult and protracted. On January 30, 1952, when the outlines of the organization had become sufficiently clear, 144 members of the Social Democratic Party, the constitutionally required one-third of the Federal Assembly,[21] petitioned the Constitutional Court to issue a preventive injunction (*vorbeugende Normenkontrolle*), decreeing that the participation of German nationals in a military establishment, without an antecedent amendment of the Basic Law, was unconstitutional. After the Chancellor had signed the treaties, on May 26 and 27, 1952, the petition was amended by a prayer to enjoin their ratification by the Federal Assembly.[22]

In the most general terms,[23] the constitutional objections of the opposition were based on the absence in the Basic Law of any provisions regarding military matters, and particularly on the absence of a military power in article 73, which enumerates the powers of the federal government. The opposition, therefore, contended that before German military contingents could be conscripted and transferred to the EDC,[24] an amendment to the Basic Law, authorizing the federal government to establish military forces, was indispensable. For such a constitutional amendment the consent of the Social Democratic Party was required, since the coalition parties did not command the two-thirds majorities in both legislative houses required by the Basic Law.[25] The opposition, however, was unwilling to approve the amendment because it believed Germany's integration in a Western military alliance would block permanently reunification with Eastern Germany, at present under Soviet control. Moreover, the action of the opposition was motivated by a strong desire to maintain constitutional legality in the clear recollection that consti-

19. *Id.* § 13 paras. 6, 14(1).

20. *Id.* § 13 paras. 5, 14(1).

21. BASIC LAW art. 93(1) para. 2.

22. Ratification of treaties by the federal legislative bodies is required by BASIC LAW art. 59(2).

23. A fuller discussion of the substantive issues appears *infra* pp. 817-27.

24. BASIC LAW art. 24(1) authorizes the Federation to "transfer sovereign powers to international institutions."

25. BASIC LAW art. 79(2).

tutional illegality had doomed the Weimar Republic and opened the door for Hitler.

The First Senate of the Constitutional Court, after oral proceedings, rejected the petition for a preventive injunction on July 30, 1952, on the ground that judicial review lies only against statutes which have been formally enacted by the parliamentary assemblies.[26] With this decision no fault can be found. A bill *in statu nascendi* is not yet a legislative act on which a court can pass, however certain may be the knowledge of its eventual contents and passage.

Request of the Federal President for an Advisory Opinion

On June 10, 1952, the Federal President, Dr. Theodor Heuss, requested the Constitutional Court to render an advisory opinion as to whether the EDC Treaty, insofar as it authorized German participation, was compatible with the Basic Law. Subsequently, on August 3, 1952, this request was extended to include an opinion on the Bonn Treaty and its "Related Conventions." The request was based on section 97 of the Law on the Federal Constitutional Court which, going beyond the text of the constitution, authorizes the Federal President, the Federal Government, the Federal Assembly and the Federal Council to request advisory opinions. The section stipulates that such an opinion must be rendered by the plenary Court—by all twenty-four justices sitting en banc. However, the statute left open an important question: whether the advisory opinion of the plenary Court is binding on either of its Senates when considering an identical legal issue raised in a subsequent controversy.

In requesting an advisory opinion the Federal President acts on his own initiative, and does not need the counter-signature of the Government otherwise mandatory for all presidential acts.[27] President Heuss, one time professor of political science and a man of vast learning, evidently believed that he could not sign and promulgate [28] the treaties when passed by the legislative bodies without the legal advice of the highest judicial organ of the land. The Basic Law leaves no doubt that even the antecedent counter-signature of the Government on a statute does not relieve the President of his responsiblity to satisfy himself that the legislative enactment is in conformity with the Constitution.[29] A statute altering the Constitution, if passed by simple majorities of the parliamentary assemblies instead of by the two-thirds vote required for constitutional amendment,[30] obviously would be unconstitutional.

The months following the presidential request were the most dramatic in the checkered history of the treaties. In a battle of bulging briefs the Govern-

26. Judgment of Bundesverfassungsgericht (I. Senat), July 30, 1952, 1 B.V.G. 396; 1 WEHRBEITRAG 436.

27. BASIC LAW art. 58. See note 32 *infra*.

28. BASIC LAW art. 82(1). Promulgation (*Ausfertigung*) is the formal certification by the Chief of State, customary in parliamentary countries, of the completion of the legislative process in conformity with constitutional requirements; it is requisite for publication.

29. BASIC LAW art. 82(1). See VON MANGOLDT, DAS BONNER GRUNDGESETZ, KOMMENTAR 442 (1953).

30. BASIC LAW art. 79(2).

ment showered the Court and the plaintiffs with a barrage of legal arguments, which the opposition struggled to counter by mobilizing experts in constitutional and international law. Moreover, the dispute took a political turn when members of the Government publicly denounced the Federal President for interfering with the Government's conduct of foreign policy even though his legal right to request an advisory opinion could not be contested.[31] The immediate result of this attack was that the President, whose political neutrality is carefully safeguarded by the Basic Law,[32] was drawn into the political arena and the prestige of the office placed in jeopardy.

The Court, after various requests by the Government lawyers for postponement, finally set December 8, 1952, as the date for the oral proceedings on the President's request. On December 9, 1952, before beginning the oral arguments, the Court announced a resolution of its plenary session that an advisory opinion rendered by the plenary Court is binding on both Senates.[33] Thereafter, on the motion of the Government, oral proceedings were adjourned to the afternoon of December 10, 1952.

On the morning of this day the Court was notified of the withdrawal of the Federal President's request for an advisory opinion.[34] The reason given was that since the opinion of the plenary Court was to bind both Senates, it would be tantamount to final disposition of the case, contrary to the "advisory" character of the opinion requested.

For an understanding of this sudden turn of events the political background must be sketched in. During the preceding months influential organs of public opinion had indulged in allegations that the *First* Senate — which by statute had assumed jurisdiction over the petition of the plaintiffs from the beginning

31. The author, in the summer of 1953, was granted an interview with Dr. Heuss and is convinced that the President was acting with the highest motives.

32. BASIC LAW arts. 54-61 endow the Federal President with far less power than his counterpart under Weimar. He is elected by a special body, *Bundesversammlung*, composed of the Federal Assembly plus an equal number of ad hoc electors chosen proportionally by the Laender. BASIC LAW art. 54. The Federal President has no real political power: his functions are representative, state-integrating and ceremonial, as the Chief of State of a parliamentary republic. Political leadership is vested in the Federal Chancellor, whose counter-signature the President must obtain for all official actions except the appointment and dismissal of the Chancellor and in special circumstances the dissolution of the Federal Assembly. *Id.* arts. 58, 63(4). Likewise free from control by any other federal organ, the President has a duty to promulgate statutes enacted in accordance with the provisions of the BASIC LAW. *Id.* art. 82(1). The first Federal President, Dr. Theodor Heuss, was elected in September 1949, and reelected by an overwhelming majority in July 1954.

33. Resolution of Bundesverfassungsgericht (Plenum), Dec. 8, 1952, 2 B.V.G. 79; 2 WEHRBEITRAG 812. The decision was 20 to 2. One of the dissenting justices, Dr. Geiger, author of the authoritative commentary on the Law on the Constitutional Court, took the unusual step of making public his dissenting opinion, despite the fact that by Law on the Federal Constitutional Court § 30(1) the Court decides *in camera*. See 2 WEHRBEITRAG 822. The decision produced a vast literature: see Federer, *Die Rechtsprechung des Bundesverfassungsgerichts zum Grundgesetz fuer die Bundesrepublik Deutschland*, 3 JAHRBUCH DES OEFFENTLICHEN RECHTS (Neue Folge) 15, 53 n.31 (1954).

34. 2 WEHRBEITRAG 811.

— was "red," with a majority favoring the opposition, while the *Second* Senate was said to be "black," with a conservative majority leaning toward the Government. The Government, instead of countering these speculations, permitted no less an official than the Federal Minister of Justice, Dr. Thomas Dehler, publicly to impugn the neutrality of the Court. Thus, in addition to the Federal President, the Court was drawn into the conflict of party politics and its usefulness as the highest judicial organ seriously impaired. Of political bias on the part of the Court or its individual members not the slightest evidence was presented.

Apparently the Government and its lawyers had convinced themselves that a majority of the plenary Court would declare the treaty bills unconstitutional and thus bind both Senates. It cannot be established definitely that the President was induced by the Chancellor to withdraw his request, but the press reported that Dr. Heuss was put under heavy pressure by Dr. Adenauer.[35] Whatever its underlying causes, the withdrawal of the presidential request brought with it a collapse of the advisory stage of the controversy.

The resolution of the Court that a plenary advisory opinion is binding on both Senates is subject to grave legal doubts.[36] Neither the Basic Law nor the Law on the Federal Constitutional Court requires that this effect be given an advisory opinion. By statute the two Senates are constituted as independent judicial agencies with mutually exclusive jurisdiction. An advisory opinion of the plenary Court would not seem to be a substitute for the final judgment of the authorized Senate in an actual controversy. Only if the two Senates should come to conflicting decisions on an identical issue, would a final decision by the plenary Court be in order.

Strange Interlude: The Government's Motion to Curb the Opposition

On December 5, 1952, the Federal Assembly passed, in the second reading, the treaty ratification bills by simple majorities [37]—an event which was followed by one of the strangest motions ever lodged before a court of law. The next day the Government filed a petition with the *Second* ("black") Senate on behalf of the three coalition parties and "the majority of the Federal Assembly," consisting of 203 deputies, acting individually and collectively, against the Social Democratic party and 127 of its individual members. The petition sought judicial declarations that the defendants violated the Constitution in contesting the right of the Federal Assembly and its majority to ratify the

35. See N.Y. Times, Dec. 10, 1952, p. 5, cols. 1-2; *id.* Dec. 11, 1952, p. 16, cols. 3-4.

36. The author is inclined to agree with the dissent of Justice Dr. Geiger.

37. The vote was 217 to 164 for the Bonn Treaty and 215 to 165 for the EDC Treaty, with 4 abstentions in both cases. 14 STENOGRAPHISCHE BERICHTE, VERHANDLUNGEN DES DEUTSCHEN BUNDESTAGES, 1. WAHLPERIODE 11528-29 (1952). The vote was strictly partisan, the coalition of the Christian Democratic Union (Adenauer's party), the Free Democrats, and the German Party voting for, the Social Democrats and a few members of some minor parties voting against.

treaties by a simple majority vote; and that the Federal Assembly had the right (*berechtigt*) to pass the treaty bills by simple majority under article 42(2) of the Basic Law. The reason why the Government chose now to cast the legal issue of the constitutionality of the treaties in terms of a dispute between governmental organs is to be found again in politics. The jurisdiction of the Second ("black") Senate extends to constitutional questions arising from disputes between the highest federal organs.[38] A petition to the Second Senate is authorized only "if the petitioner claims that he or the federal organ of which he is a part, suffers a violation of his rights under the Basic Law or if his rights are seriously endangered by an action of the defendant."[39] Realizing that it could not win a favorable decision from either the plenary Court or the First Senate, the Government sought, by petitioning what it believed to be a friendly court, to establish indirectly the constitutionality of the treaties and to enjoin the opposition from exercising its right to oppose. During the oral proceedings, in late February 1953, the petition was enlarged by a request for a judicial declaration that legislative action taken on the second reading and action still to be taken on the third reading do not require a constitutional amendment, and that after passage of the bills by simple majorities, the Federal President is obligated to promulgate the treaties without further inquiry into their constitutionality.

On March 7, 1953, the Second Senate rejected the petition in a decision which can vie with the classics in democratic jurisprudence.[40] The right of the petitioners as Assembly parties to bring suit[41] was not contested, but the Court vigorously denied the right of the parliamentary majority, a strictly political phenomenon without legal capacity, to petition the Court. The Court reasoned that a statute is enacted by the Federal Assembly as a constitutional organ, not by its majority, and refused to take legal cognizance of the fact that under the iron discipline of the Government the majority would pass the bills on the third reading. The Court was no more patient with the contention of the petitioners that the opposition of the opposition prevented them from freely exercising their parliamentary mandate. Trenchantly it wrote:

> "It is not only the right of the opposition to make known, in addition to their political, also their constitutional objections, but this is, in the parliamentary-democratic state, its duty . . . . There exists neither the legal right of the parliamentary majority to impose its legal viewpoint within the parliament, nor does an obligation exist of the minority to submit to the legal viewpoint of the majority."[42]

It is a revealing reflection on the depth of penetration of the democratic spirit in postwar Germany that the Government and its subservient coalition believed

38. BASIC LAW art. 93(1) para. 1; Law on the Federal Constitutional Court §§ 14(1), 13 para. 5.

39. *Id.* § 64.

40. Judgment of Bundesverfassungsgericht (II. Senat), March 7, 1953, 2 B.V.G. 143.

41. Law on the Federal Constitutional Court § 63.

42. Judgment cited *supra* note 40, at 170-71.

that the authoritarian principles of command and obedience could be legally grafted onto the parliamentary system.

The Controversy before the Federal Council

Now the spotlight shifted from the halls of justice to the political arena. On March 19, 1953, the treaty bills were passed by a majority of the Federal Assembly in the third reading with the same alignment of parties as before.[43] The question arose of what the second chamber, the Federal Council, would do.

Unlike the second chamber in most federal states the Federal Council[44] is composed of representatives appointed by the Land governments and instructed how to vote. In most cases these instructions follow the party line of the appointing Land government. Also unlike most federal states the representation of the Laender in the Federal Council, instead of being equal for each constituent unit, varies, in keeping with the German tradition of "federalistic arithmetics," from three to five votes according to population.[45] Furthermore, the votes of a Land cannot be split but must be cast as a unit.[46] The Basic Law makes the Council the guardian of states rights by giving it a veto power (*Einspruch*) over statutes affecting states' rights.[47] A Council veto can be overridden by a majority of the Federal Assembly if the Federal Council has vetoed by simple majority, but only by a two-thirds majority of the Assembly if the Council has vetoed by a two-thirds majority.[48]

The Federal Government wished to avoid submission of the bills to the Federal Council because at that time it did not command the reliable majority there which it possessed in the Federal Assembly. Socialist governments, or at least coalition governments in which Socialists occupied the leading position, were in power in several Laender, controlling twenty[49] of the thirty-eight votes in the Council. The key position in the Federal Council was held by Baden-Wuerttemberg,[50] with five votes, whose Minister President, Dr. Reinhold Maier, a lawyer and at that time Chairman of the Council, had announced

43. 15 STENOGRAPHISCHE BERICHTE, VERHANDLUNGEN DES DEUTSCHEN BUNDESTAGES, 1. WAHLPERIODE 12366 (1953).

44. BASIC LAW art. 51(1). For a more detailed description of the organization of the Council, see Loewenstein, *The Government and Politics of Germany*, in GOVERNMENTS OF CONTINENTAL EUROPE 571-73 (Shotwell rev. ed. 1952).

45. BASIC LAW art. 51(2).

46. *Id.* art. 51(3).

47. *Id.* art. 77(3).

48. *Id.* art. 77(4).

49. Baden-Wuerttemberg and Lower Saxony (five votes each), Hessen (four), and Hamburg and Bremen (three each). It was known that the Socialist Land Governments were not all of one mind concerning EDC — for example, the government leaders in Hamburg and Bremen, Herr Brauer and Kaisen, were in favor of EDC — but the iron discipline of the party made them toe the line.

50. Baden-Wuerttemberg had been reconstituted, in 1951-52, by a merger of three smaller and formerly separate state entities. See Leibholz, *The Federal Constitutional Court in Germany and the "Southwest Case"*, 46 AM. POL. SCI. REV. 723 (1952).

officially his grave doubts concerning the constitutionality of the treaties.[51] In the face of such obstacles the Government contended that the treaties did not affect states' rights and, therefore, need not be submitted to the Federal Council.

Steered skillfully by Dr. Maier, the Council, on April 24, 1953, sidestepped the issue by voting, twenty to eighteen, to take no action on the treaty bills—that is, neither to approve nor to reject them formally—until the Court had rendered an advisory opinion on their constitutionality.[52] Politically, Dr. Maier had no other course: by throwing his five votes to the opposition, he would have voted himself out of his party; by voting for the treaties he would have driven the Socialists from his coalition and possibly voted himself out of his job. Dr. Maier argued convincingly that, if both houses passed the bills by simple majorities, and afterwards the Court found them unconstitutional, the parliament as a whole would suffer an irreparable loss of prestige. The crucial issue, therefore, whether the treaties required formal action—either approval or rejection—by the Council, was left open.

The Chancellor was thus left free to attempt to force the hand of the Federal President who, under article 82(1) of the Basic Law, must sign and promulgate statutes enacted in conformity with the provisions of the Basic Law. However, as early as March 1953, President Heuss, a proven democrat, had committed himself to the leader of the opposition, Erich Ollenhauer, not to sign the treaties before the Court had attested their constitutionality. Dr. Heuss refused to break this promise.

The request of the Federal Council for the advisory opinion of the Court sent the treaties back to the Assembly. Under section 97(1) of the Law on the Federal Constitutional Court a request for an advisory opinion requires the joint motion of the Assembly, the Council, and the Government. The coalition parties of the Assembly did not accede to the request of the Council, for an opinion rendered by the plenary Court was as unwelcome to them now as it had been at the time of the President's request. The Chancellor's next move was political. To break the hostile majority in the Federal Council he tried to wean the smaller parties away from the coalition in Lower Saxony and install a coalition government in that Land favorable to his policies. In this he failed. The issue was deadlocked.

But in the labyrinth of German politics the constitutional screw was soon given a new turn. Dr. Karl Arnold, Minister President of North Rhine-Westphalia and a powerful leader of the Adenauer party, moved for a reconsideration of the treaty bills in the Federal Council. Following a scheme invented by Dr. Hans Ehard, Minister President of Bavaria and leader of the Christian Social Union, which is allied with the Adenauer party, the Federal Council on May 15, 1953, reversed its previous decision to take no

51. Dr. Maier himself belongs to the left wing of the conservative Free Democrats, the second strongest party in Dr. Adenauer's coalition. His cabinet was composed of five Socialists, two other Free Democrats and one member of the German Party.

52. N.Y. Times, April 25, 1953, p. 1, col. 7.

action on the bills. Instead, it resolved that the two treaties themselves did not directly affect states' rights and, therefore, that they had been enacted when passed by the Assembly. No Council action, positive or negative, was taken on them. However, certain provisions of the technical conventions attached to the treaties were found to affect states' rights and to require formal approval by the Council.[53] This was granted by a majority of twenty-three to fifteen.[54]

This action of the Council completed the legislative stage and ended the parliamentary struggle over the treaties, at least for the time being. But the basic issue of the constitutionality of the treaties was no closer to resolution. Moreover, the Socialist opposition in the Federal Council announced that it would contest, before the Court, the validity of the course taken by the Council on the ground that the Council was obligated to approve or disapprove the treaties. Thus, a new and difficult issue was added to the ample pile of controversies saddled on the Constitutional Court. Meanwhile, the treaties were laid to rest on the desk of the Federal President for his signature. This was not to come for almost another year.

The Frontal Attack of the Social Democratic Party

On May 11, 1953, 147 members of the Federal Assembly, including the entire Social Democratic Party and a few members of smaller parties outside the government coalition, constituting together more than one-third of the Assembly, petitioned the Constitutional Court for a decision on the constitutionality of the treaties now formally ratified by the legislative assemblies. Though no formal steps were taken, this petition in fact superseded the original complaint of the opposition which all the time had remained undecided on the docket of the Court. At long last a direct attack on the treaties was permissible under the previous decisions of the Court, by which it had held that it could not pass on constitutionality before the legislative stage had been completed.[55] Although the treaty statutes had not yet been formally promulgated by the Federal President, the Court had indicated that it would take the issue under judicial consideration without the presidential signature, which itself awaited the Court's decision.

Plaintiffs, in two massive briefs, marshalled their assault batteries in three

53. These were: *Agreement on the Tax Treatment of the Forces and their Members*, signed at Bonn, May 26, 1952 (as amended by the protocol signed at Bonn, July 26, 1952), and *Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany*, signed at Bonn, May 26, 1952. N.Y. Times, May 15, 1953, p. 1, cols. 3-4, p. 5, cols. 5-6.

54. N.Y. Times, May 16, 1953, p. 1, col. 3. The dissenting minority was composed of the Laender Lower Saxony (five votes), Hessen (four), Bremen and Hamburg (three each). Dr. Maier joined the majority with his five votes. *Id.* at p. 5, col. 5. He may have felt that by separating the treaties from the technical conventions the legal requirements were satisfied and that the fate of his coalition would be decided anyway by the general elections for the Federal Assembly scheduled for autumn of 1953.

55. See text at note 26 *supra*.

groups. In the first place they contended that the Federal Council erred constitutionally in approving the several conventions implementing the treaties because various provisions deviated from the Basic Law and, therefore, would have required acceptance by qualified majorities and verbal insertion into the text of the Basic Law.[56] Secondly, plaintiffs argued that the treaty bills themselves, which the Federal Council had neither approved nor rejected because they were held not to affect states' rights, actually did affect states' rights, and that, therefore, the bills were unconstitutional on procedural grounds. Legal logicians would say that the plaintiffs' contention resembled an argument that the egg came before the chicken: if they were right in contending that the legislative process had not been completed, their constitutional challenge was premature under the earlier decisions of the Court. Finally, the plaintiffs restated and amplified their earlier substantive objections to the constitutionality of the treaties under the Basic Law.

It was expected that the Court would at long last proceed to decide on the merits whether the treaties were constitutional, but it assiduously continued to mark time and act as patient recipient of an avalanche of briefs and legal opinions hurled at it by the Government and the opposition. Erudite and comprehensive as they were, they contained little of new substance. One is reminded of Goethe's epigram: "*Getretener Quark wird breit, nicht stark.*"[57] Yet the reluctance of the Court to decide the case at long last is easily understood: with the general elections scheduled for September 6, 1953, the Court did not wish to risk a conflict with the verdict of the political sovereign on the treaties.

However, one important event did occur during this judicial stall. Under an order of the Court the Government submitted the texts, some only in draft form, of five agreements implementing the treaties which, though kept secret up to that time, were ex post facto to be included in the treaty-statutes. The parliamentary bodies had thus ratified agreements which they never saw, a revealing reflection on executive-legislative relations in the German democracy.

THE SUBSTANTIVE ISSUES

The division of the substantive issues into five "areas of problems" suggested by the Court in preparation for the oral proceedings in December 1952 [58] will, for convenience, be followed here in what must be a highly selective discussion of nearly two million words of legal briefs.

Was the controversy "justiciable"?

A prima facie doubt had to be resolved. Was the decision requested of the Court a legal one or was it political? In the United States the courts

56. BASIC LAW arts. 79(1), (2).

57. "When stirred up cream cheese becomes broader but does not stiffen."

58. See 2 WEHRBEITRAG 802. The court enumerated no fewer than 37 different legal issues to be argued. See also Government brief of August 12, 1953, pp. 15-61; and Social Democratic Party briefs of December 30, 1953, pp. 8-58, and January 13, 1954, pp. 15-58.

would have refused to adjudicate some of the major issues under discussion as non-justiciable "political questions," *e.g.*, the relations between the majority and the minority of the parliamentary bodies, the conformity of the legislative procedure with the constitution, or the extent of the treaty-making power of the government. But under the legal system established by the Bonn Constitution, the existence of political and, hence, non-justiciable controversies (*justizfreie Hoheitsakte, actes de gouvernment*) is not recognized.[59] Furthermore, the problem in Germany is far greater than merely finding reasonable limits for judicial review. It goes to the roots of prevailing German political philosophy. Under the Empire, the government when exercising sovereign powers (*Hoheitsakte*) of the state was considered superior to the judiciary. Weimar attempted to subject political dynamics as far as possible to judicial control. In turn Hitler's acts of personal despotism were rationalized, by legal science and the courts, into positive law beyond judicial challenge.[60] In understandable reaction, the Bonn Basic Law went to the extreme to "judicialize political power."[61] The entire range of potential political conflicts between the highest state organs was deliberately brought under the purview of a judicial agency whose members were carefully selected in such a way as to insure their political neutrality. The catalog of constitutional disputes within the jurisdiction of the Court is practically exhaustive.[62] Despite the fact that the decision requested of the Court, in its immediate and ultimate effects, was of paramount political importance, the parties were in substantial agreement that the issue was basically, under the terms of the Constitution, a legal question determinable by the Court.[63] Nonetheless, it is well to recognize that the controversy was doomed to run headlong into the difficulties inherent in resolving political issues through the application of legal norms.

Status of the Federal Republic

The first "area of problems" concerned the character of the German Federal Republic as a state (*Staatscharakter*) and its capacity under domestic law

59. A recent decision of the Supreme Administrative Court of Western Berlin of September 26, 1952, [1953] JURISTENZEITUNG 644, would concede the existence of non-justiciable questions only for "a political act on the highest political level," such as declaration of war, recognition of a foreign government, or dissolution of parliament. But even a dissolution could be challenged as illegal under the Basic Law.

60. See, *e.g.*, IPSEN, POLITIK UND JUSTIZ (1937). For the recent change in attitude, see SCHNEIDER, GERICHTSFREIE HOHEITSAKTE (1951). For a restatement of the French theory and practice of *actes de gouvernment*, see Eisenmann, *Gerichtsfreie Hoheitsakte im heutigen franzoesischen Recht*, 2 JAHRBUCH DES OEFFENTLICHEN RECHTS, (Neue Folge) 1 (1953).

61. But see, *e.g.*, the pertinent doubts of WEBER, WEIMARER VERFASSUNG UND BONNER GRUNDGESETZ (1949); Loewenstein, *Justice*, in GOVERNING POSTWAR GERMANY, 236, 262 (Litchfield ed. 1953).

62. BASIC LAW art. 93.

63. Non-justiciability of the controversy over the EDC treaties was claimed by Apelt, *Ist der Streit um die Verfassungsmaessigkeit des EVG-Vertrages eine Streitigkeit im Sinne des Art. 93 GG?*, 6 NEUE JURISTISCHE WOCHENSCHRIFT 641 (1953).

to conclude an international treaty integrating Western Germany into a military alliance for a fifty year period. If Western Germany possessed this capacity would the treaty bind all of Germany when and if unification took place? The Bonn Treaty envisaged extension (*"erstrecken"*) of the rights the Federal Republic had obtained under the EDC Treaty to a unified Germany if the latter were willing to assume the treaty obligations.[64] The opposition interpreted this provision as hampering the free decision of a unified Germany to remain in, or to leave, the Defense Community. On the basis of the language of the treaty, this argument is not convincing.

The issue was tied directly to the legal problem, much discussed since the Basic Law was adopted in 1949, as to whether the Constitution will extend automatically to all of Germany after unification, or whether a Constituent Assembly elected by all Germany will have to draft a new instrument. On this point the Basic Law is rather ambiguous. Article 23 stipulates that the Basic Law applies, for the time being (*zunaechst*), to the Laender of Western Germany named therein—optimistically, if unrealistically, Greater Berlin is included—and provides that it "shall be put into force for other parts of Germany [meaning the Eastern Zone] on their accession." Two other Basic Law provisions are relevant. The preamble states that "the German People" of the Laender constituting the Federal Republic "have acted also on behalf of those Germans to whom participation was denied," and article 146 announces: "The Basic Law shall become invalid on the day when a constitution adopted in a free decision by the German people comes into force." Government and opposition were agreed that the Federal Republic could not legally make territorial decisions which would be binding on a unified Germany: this, for example, is the unanimous attitude taken in the Saar dispute with France [65] and the reasoning applies with equal force to the territories forcibly yielded to Russia and Poland.

Under these circumstances, could the Government of the Federal Republic mortgage the future of a unified Germany by integrating Western Germany into the Atlantic defense system? This the opposition emphatically denied, though at first some rather far-fetched arguments were mustered to support the position: The Federal Republic was said to be merely a "fragment" of a state, not a full-fledged sovereign state, and the Bonn instrument, merely a provisional and transitional organization statute, not a full-fledged constitution (*Vollverfassung*).[66] Most of these arguments were compromised by agreement of the parties on the following points: (a) The Federal Republic was not a new state which came into existence upon unconditional surrender, but

64. Bonn Treaty art. 7, § 3.

65. The international position of the Saar is a most controversial subject. See, *e.g.*, Menzel, *Die Diskussion ueber die gegenwaertige Rechtsstellung des Saarlandes*, 9 EUROPA ARCHIV 6599 (1954).

66. The term *"Grundgesetz"* was originally chosen by the Parliamentary Council drafting the Basic Law to indicate that Germany, under the occupation, was not sovereign and that, instead of a genuine constitution, all that could be created was an organization statute.

was the legal continuation of and successor to the Reich;[67] (b) the Basic Law is a complete constitution and not a provisional, transitory, or fragmentary organization statute; (c) the territory of the German Federal Republic as established by the Basic Law is identical with that of the German Reich as of 1937 (prior to the Austrian *Anschluss*) and includes the territory of Eastern Germany.

But on the crucial issue whether the Federal Republic could act internationally on behalf of Eastern Germany irreconcilable disagreement persisted. While asserting that the Federal Republic is the only legal *state* within the territory of Germany, the opposition nonetheless denied that the Western German *government* is the only *government*. The Pankow regime of Eastern Germany was at least a de facto government. Thus the Federal Government lacked legal capacity to conclude an international treaty of such importance; only an all-German government selected by all German voters would be able to do this. The legal arguments of both parties are basically political, evidencing a common desire for unity and a refusal to accept a schizophrenic Germany. Yet realistically, neither argument has compelling validity. The jurisdiction of the Federal Republic ends at its eastern border on the Elbe. The claim of the Federal Republic to speak internationally for eastern Germans is no better founded than similar claims of the East German government, for neither is truly representative of the people of all Germany.

The genuine patriotism of the opposition should not be minimized, but the political stimulus for its legal position is apparent. Traditionally the Socialists drew their main voting strength, apart from the Ruhr, from Berlin and the industrialized sections of the East. Free elections in a unified Germany might well bring into power a Social Democratic Government with a foreign policy opposed to integration in any international alliance.

On the whole, the round fought over the first "area of problems" ends even.

Military Sovereignty and Military Powers of the Federal Republic

The second and third "areas of problems" can be treated together. They center on the twofold question whether Western Germany, under *international* law, possesses "military sovereignty" (the most approximate though still inadequate translation of *"Wehrhoheit"*) and, whether, under *national* law, the exercise of military powers (*Wehrgewalt*) belongs to the federal state or the Laender. In other words, is the right to establish national military forces an inalienable attribute of sovereignty *per se*, or does military sovereignty require specific arrangements and assignments of military power in the national con-

67. This issue seems settled by a decision of the Supreme Federal Court of July 14, 1953, 6 NEUE JURISTISCHE WOCHENSCHRIFT 1705 (1953). The Federal Constitutional Court, by repeated decisions and resolutions, adhered to the position that the Federal Republic is the legal successor of the German Reich under constitutional and international law. See Federer, *Die Rechtsprechung des Bundesverfassungsgerichts zum Grundgesetz fuer die Bundesrepublik Deutschland*, 3 JAHRBUCH DES OEFFENTLICHEN RECHTS (Neue Folge) 15, 37 (1954).

stitution? As could be expected, German legal science had a field day with the elusive concept of "sovereignty."

The Bonn Constitution failed to mention a military establishment (except by certain oblique references) and, in particular, failed to include military powers in the otherwise exhaustive catalog of exclusive federal powers in article 73. When the Parliamentary Council, closely supervised by the Occupation Powers,[68] drafted and adopted the Basic Law, the general aversion to a revival of German militarism was shared by the Germans. Consequently —and the debates of the Parliamentary Council leave no doubt on this point [69]— military powers were deliberately omitted from the Basic Law.

The Government, however, argued from various indirect references that the Basic Law implicitly assumed the establishment and maintenance of military forces. Article 4(3) guarantees as one of the fundamental human rights, the right of the conscientious objector not to be compelled to bear arms. The Government maintained that if the constitution protects the right of the conscientious objector, by *argumentum e contrario* it authorizes conscription. This provision, however, was merely a product of the pacifistic mood prevailing at that time in Western Germany. It may also have been designed to preclude conscription of German nationals as mercenaries of the Occupation Powers. Article 26(1) makes "preparing for aggressive war" a criminal offense. From this provision the Government argued that, if a war of aggression is specifically prohibited and punishable, by implication a war of defense is legal, and for this purpose military forces are authorized. *Quod erat demonstrandum.* Finally, article 140 of the Basic Law incorporated by reference five articles of the Weimar Constitution, among these, one, article 141, reaffirming the exercise of religious freedom in hospitals, prisons, and other public institutions and in the army. Hanging the mighty German *Wehrmacht* on the flimsy peg of an obvious drafting oversight alluding to army chaplains was the only comic relief offered in an otherwise bitterly fought controversy.

Well aware that these oblique references constitute a shaky constitutional basis for a federal military establishment, the Government relied primarily on legal arguments based on Western Germany's status as a sovereign state, recognized at least since the so-called Petersberg Protocol of November 22, 1949.[70] Under international law every sovereign state has the right of self-preservation and self-defense and to that end the right to arm itself.[71] This

68. See Loewenstein, *The Government and Politics of Germany*, in GOVERNMENTS OF CONTINENTAL EUROPE 589 *et seq.* (Shotwell rev. ed. 1952).

69. See 43d Sess. of the Main Committee of the Parliamentary Council, Jan. 18, 1949, STENOGRAPHISCHE BERICHTE 35.

70. The text of the Petersberg Protocol is found in GOVERNING POSTWAR GERMANY 619 (Litchfield ed. 1953).

71. See, *e.g.*, *Draft Declaration of the Rights and Duties of States*, art. 12, in International Law Commission, *Report*, U.N. GENERAL ASSEMBLY OFF. REC., 4th Sess., Supp. No. 10 at 8 (Doc. No. A/925) (1949); 1 FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC § 242 (8th ed. 1922); HALL, INTERNATIONAL LAW c. 7 (8th ed., Higgins 1924); 2 OPPENHEIM, INTERNATIONAL LAW 156-57 (7th ed., Lauterpacht 1952).

rule of international law is recognized in article 51 of the United Nations Charter. Moreover, the Government found specific authority in the Basic Law for application of the rule to Germany: article 25 incorporates the "general rules of international law" into federal law with a rank superior even to federal statutes, and more specifically, article 24(2) authorizes the Federal Republic to integrate itself, for the preservation of peace, into a system of collective security. Participation in such a system allegedly would necessitate rearming. Hence, Western Germany is entitled, even duty-bound to rearm. The failure of the Basic Law to include military matters among the federal powers, the Government concluded, did not constitute a gap in the constitution (*Verfassungsluecke*) to be filled only by formal constitutional amendment;[72] if such a gap did exist it was filled by the international status of the Federal Republic as a sovereign state. Here the rights and duties of the state under international law were equated with the rights and duties of the citizens under domestic law.

So far so good. The opposition readily conceded military sovereignty (*Wehrhoheit*) to the Federal Republic as a sovereign state. But this was not a concession that the federal legislature is entitled automatically to establish armed forces without a specific designation by the Constitution of who is to exercise military power internally (*Wehrgewalt*). Nor was the opposition willing to admit that conscription with its limitations on fundamental rights could be effected without specific constitutional authorization. The opposition refused to accept the Government's easy equation of military sovereignty of the state in international law and the omnipotence of the federal legislature in domestic law—which in practice means little less than omnipotence of the Federal Government. The opposition strongly emphasized the fundamental principle of the democratic-constitutional state: all government is composed of constituted and limited powers, and the Basic Law is a comprehensive constitution, which goes to the greatest length to enumerate all powers of the state and to distribute them carefully between federal government and member states. The legal legerdemain indulged in by the Government brings to the surface an old stock-in-trade in German constitutional jurisprudence: a state mysticism which believes itself entitled to create non-constituted governmental powers by the invocation of a "natural law of the sovereign state." What the positive constitutional law denies to the Federal Government it can obtain by invoking principles of the general theory of the state allowing the sovereign government to do everything it deems necessary for the welfare of the community.

In this connection a great deal was made, by both sides, of the American

72. The problem of legal gaps in an otherwise codified order of law is a familiar preoccupation of German jurisprudence. It has its traditional roots in the strict subordination of the judge under the positive law; and in constitutional law it is bolstered by the assumption that a constitution, as a fundamental law, has the character of finality and comprehensiveness. On the *Verfassungsluecke* under Weimar and in the general theory of the state, see LOEWENSTEIN, ERSCHEINUNGSFORMEN DER VERFASSUNGSAENDERUNG 122-28 (1931).

constitutional theory and practice of "implied powers" (*kraft Sachzusammenhang*)[73] and even of "resultant powers" rejected by the United States Supreme Court in the steel seizure case.[74] But while in the steel case the President based his action on powers implied from his function as commander-in-chief and other specifically delegated powers, the Adenauer Government claimed its right to establish military forces solely on the mystique of the allegedly comprehensive (*umfassend*) nature of state sovereignty.[75]

Finally, the Government's self-assignment of military powers ignores the federal structure of the German Federal Republic. With ample reference to comparative law material the Government argued that legislative powers are by definition all-embracing and non-enumerable (*unaufzaehlbar*), and that no specific assignment is necessary for any specific legislative activity. Legislative omnipotence may exist in unitary states such as France or Great Britain, but it is alien to states whose federal structure requires a delineation of federal and state powers. The opposition showed that no contemporary federal constitution failed to make an explicit assignment of military powers to either the federal state, or the member units, or both.[76] In the absence of such a specific authorization, they argued, a constitutional amendment was necessary.

The second and third rounds of the constitutional struggle, therefore, go to the opposition.

Transfer of Sovereign Rights to International Organizations

It is the fourth "area of problems" that contains the nub of the controversy. It centers on article 24 of the Basic Law, which authorizes the Federal Republic to transfer "by statute" sovereign rights to international organizations (*zwischenstaatliche Einrichtungen*) and to integrate itself, for the preservation of peace, into a system of mutual collective security, consenting to such limitations of its sovereign rights as lead to and secure a peaceful and permanent order in Europe and among the nations of the world. The core of the Government's argument was that, in this process of transferring sovereign rights, the Federal Republic is not confined to those rights specifically delegated to it by the Bonn Constitution: rather, all rights inherent in the sovereign state may be transferred by ordinary federal statute. Consequently, no constitutional amendment was necessary to transfer military sovereignty to the defense

73. For a recent German discussion, see Kruse, *Implied Powers und Implied Limitations*, 4 ARCHIV DES VOELKERRECHTS 169 (1953).

74. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The case was discussed for German lawyers in Loewenstein, *Konflikte zwischen Regierung und Justiz*, 78 ARCHIV DES OEFFENTLICHEN RECHTS 260, 266-68 (1953).

75. Both parties, with widely different interpretations, exploited the case of United States v. Curtis-Wright Export Co., 299 U.S. 304 (1936). The Government claimed that the President exercised embargo rights by virtue of being the sole representative of the United States in international law, while the opposition—correctly—referred to the specific delegation he had received from Congress.

76. See Legal Opinion of Professor Menzel, 1 WEHRBEITRAG 280, 301; Legal Opinion of Professor Loewenstein, 2 WEHRBEITRAG 337, 347-49.

community: article 24(1) operates in the place of an amendment and renders it superfluous.

At first sight the Government's position finds support in the text of article 24(1) which authorized the transfer of sovereign rights "by statute" (*"durch Gesetz"*). That these two words were not intended to remove the necessity for a constitutional amendment before transferring a sovereign right not enumerated among federal powers is apparent from the debates of the Parliamentary Council:[77] First, the words were designed to place an act of such political importance beyond the power of the Federal President acting alone as the international representative of the Federal Republic; they require legislative action—"by statute"—as is necessary for all international treaties regulating the political relations of the Federal Republic.[78] Second, the words were intended to demonstrate the willingness and eagerness of Western Germany to participate in efforts to promote international organization and peace: a simple majority vote of the legislatures was made sufficient to enact a transfer statute rather than the qualified majority needed for a constitutional amendment. A motion to make transfer legislation dependent on the qualified majorities required for constitutional amendment was rejected by the Parliamentary Council.[79]

Altogether different, however, is the question whether a transfer statute can transfer sovereign rights not mentioned in the constitution. The opposition referred to Ulpianus' classicly formulated maxim, *Nemo plus iuris ad alium tranferre potest, quam ipse haberet*:[80] if the military power does not exist under the constitution, it is, a fortiori, not constitutionally transferable. By the Government's interpretation, article 24(1) rises to the status of a super-article, beyond the requirements of constitutional amendment, a sort of constitution within a constitution. When prodded by the opposition, the Government conceded that the super-constitutional attributes of article 24(1) find their limits in the constitutional provisions unalterable even by constitutional amendment:[81] those dealing with the federal structure of the German Federal Republic, the participation of the Laender in the legislative process, the dignity of man, the rule of law, and the separation of functions. But with these exceptions the super-constitutional powers inherent in article 24(1)—exercised by simple parliamentary majorities—were alleged to override all other funda-

77. For a review of the genesis of this clause, see VON MANGOLDT, DAS BONNER GRUNDGESETZ, KOMMENTAR 161-63 (1953).

78. BASIC LAW art. 59(2).

79. See 6th Sess. of the Main Committee of the Parliamentary Council, Nov. 19, 1949, STENOGRAPHISCHE BERICHTE 69r, 70r (motion Seebohm), 29th Sess., STENOGRAPHISCHE BERICHTE 364r (motion Seebohm), and the contrary positions taken by the Deputies Schmid and Eberhardt, leading to the rejection of the motion Seebohm, *ibid.*

For recent comparative material which demonstrates that other states, in the identical situation of yielding sovereign rights to international organizations, require qualified majorities in the parliament, see note 107 *infra*.

80. JUSTINIAN, DIGEST 50.17.54.

81. BASIC LAW art. 79(3).

mentals of limited government including the regular process of constitutional amendment. The Government's case stood and fell on its interpretation of article 24(1).

Another point argued at length by the parties was the character of EDC as a "system of collective security" under article 24(2). The contention of the opposition that EDC, including a rearmed Germany, increases the danger of war and, therefore, is not conducive to collective "security," was frankly political. But with legal relevance the opposition pointed out that unarmed nations may have a vital interest in joining a system of collective security, and that the Grand Design of global collective security, the United Nations, does not require military contributions from all its members. Article 43(1) of the United Nations Charter, which envisaged the conclusion of agreements with the member nations concerning military assistance, is a dead letter. Furthermore, the United States saw no barriers to an attempt to bring a constitutionally disarmed [82] Japan into the U.N.[83]

The fourth round likewise must be counted for the opposition.

The Theory of the "Electoral Mandate"

Little need be said about the fifth "area of problems" centering about the opposition's allegation that since the remilitarization issue was not before the voters in the 1949 elections, the Federal Assembly had no legal right to adopt the treaties without first obtaining an electoral mandate for that action in a general election. Invocation of the theory of the electoral mandate was inspired by the constitutional theory and practice of Great Britain, although it has not developed there into a genuine constitutional convention, and in recent times has been as much ignored as observed.[84] While other democratic states have institutionalized the popular mandate by constitutionally requiring dissolution of parliament and new elections as a condition of constitutional amendment,[85] the theory has no basis in German constitutional law. Under article 79 the legislative assemblies can pass constitutional amendments without calling general elections.

The fifth round, thus, goes to the Government, which, however, did not fail to claim that it had received an electoral mandate for EDC after its overwhelming electoral victory in September 1953.

Specific Treaty Provisions in Conflict with the Basic Law

In a sizable number of instances the opposition raised constitutional objections to individual provisions of the EDC and the Bonn Treaties as deviating from the Basic Law (*Verfassungsdurchbrechung*). Any provision which did

82. JAPAN CONST. OF 1946 art. 9(2).

83. This attempt was frustrated by the Soviet Union in the Security Council, although a favorable vote was subsequently rendered in the General Assembly. U.N. GENERAL ASSEMBLY OFF. REC., 7th Sess., Plenary 479 (1952).

84. See, *e.g.*, JENNINGS, PARLIAMENT 429-32 (1940).

85. See, *e.g.*, BELGIUM CONST. art. 131; NETHERLANDS CONST. arts. 202, 203.

deviate from the Basic Law would have to be passed by two-thirds majorities of both the Assembly and the Council, and then written into the text of the Basic Law provisions it modified.[86] The following will serve as illustrations of the provisions said to conflict with the Basic Law.[87]

Article 12 of the EDC Treaty authorized the participating states to request the Commissariat, EDC's "supra-national" authority, to permit transfer of parts of the national military contingent to the home government when needed to meet existing or threatened disturbance of public order. Such domestic emergency powers, reminiscent of the ominous article 48 of the Weimar Constitution, were deliberately denied the Federal Government under Bonn. The opposition, therefore, argued that a treaty authorizing retransfer of military powers from EDC to the Federal Government was equivalent to an assignment of military emergency powers to the Federal Government. This would produce a complete disequilibrium in federal-state relations which could be undertaken only by constitutional amendment.

Article 9 of the Bonn Treaty established an Arbitration Tribunal with exclusive jurisdiction over all disputes arising under the treaty or any of its conventions between the Three Powers and the Federal Republic. The Arbitration Tribunal was authorized, in the case of the failure of a participating state to comply with its decision, to issue orders binding on the delinquent state.[88] The opposition alleged that this was a delegation of legislative powers in violation of the separation of functions required by article 20(3) of the Basic Law—a principle unalterable even by constitutional amendment.[89]

The *Convention on the Settlement of Matters Arising out of the War and the Occupation*, attached to the Bonn Treaty, provided that the obligations stemming from the confiscation of German assets abroad by the Allied Powers during the war would be assumed by the German Government.[90] Because no provision was made to determine the "nature and extent" of compensation, the opposition contended the treaty was in derogation of article 14(3) of the Basic Law, which allows expropriation only under a statute determining these matters and permitting appeal to the ordinary courts.

The *Protocol on Justice*, attached to the EDC Treaty, established the responsibility on the Community for injuries to individuals caused by its officials in the exercise of their duties.[91] Special tribunals are established to determine

86. BASIC LAW arts. 79(1), (2).

87. See also Ehmke, *Verfassungsaenderung und Verfassungsdurchbrechung*, 79 ARCHIV DES OEFFENTLICHEN RECHTS 385, 416-17 (1954).

88. *Charter of the Arbitration Tribunal* art. 11(6). [1954] BUNDESGESETZBLATT pt. 2, at 69-72.

89. BASIC LAW art. 79(3). Article 11(6) of the *Charter of the Arbitration Tribunal* makes the reservation that such legal regulations issued by the Tribunal must not be inconsistent with the Basic Law. [1954] BUNDESGESETZBLATT pt. 2, at 74-75. The legislative functions assigned to the Tribunal, however, are themselves inconsistent with the Constitution.

90. *Convention on the Settlement of Matters Arising out of the War and the Occupation* ch. 6, arts. 2-5. [1954] BUNDESGESETZBLATT pt. 2, at 202-04.

91. *Protocol on Justice* art. 1. [1954] BUNDESGESETZBLATT pt. 2, at 390.

the responsiblity for, and the amount of, damages,[92] and their decisions are subject to immediate execution.[93] These arrangements, the opposition argued, were in conflict with article 34 of the Basic Law which provides that the ordinary courts cannot be deprived of jurisdiction in actions for damages arising from acts of public officials.

The Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany,[94] attached to the Bonn Treaty, authorized the extradition of members of Community forces who committed criminal acts not only to their home state but also to the state to whose military contingent they belonged. By this provision a German national, serving as a member of the contingent of another EDC nation in Germany, could be extradited to a foreign jurisdiction contrary to the blanket prohibition of Basic Law article 16 against extradition of German nationals.

THE CONSTITUTIONAL AMENDMENT

This plethora of erudite legal arguments—and many more not discussed here—were knocked into a cocked hat by the general elections for the Federal Assembly on September 6, 1953. [95] Chancellor Adenauer's coalition obtained 307 of the 487 seats—only 18 seats short of a two-thirds majority—and the Social Democratic Party with 151 seats no longer controlled one-third of the Assembly. Whether the Chancellor's European policy or Germany's prosperity under his leadership was responsible for his electoral success was much debated at that time. Upon his re-election Dr. Adenauer proceded to secure the qualified majorities needed for a constitutional amendment to remove the opposition's objections to EDC. This majority he achieved by including in his coalition the All-German Bloc (Refugee Party) with twenty-seven seats. In the Federal Council too the tables were skillfully turned on the opposition. The major *coup* administered here secured five votes by breaking up the government coalition in Baden-Wuerttemberg. Dr. Maier resigned under pressure and was replaced by a member of the Chancellor's party, while the Socialists went into the opposition. With the subsequent victory by the slimmest of margins of a bourgeois coalition over the Socialists in Hamburg, three additional votes were captured. The Chancellor now commanded twenty-six against possibly twelve votes in the Council.[96] The stage was set for the denouement of the constitutional deadlock.

At this point a description of the procedure of constitutional amendment under article 79 of the Basic Law will be helpful.[97] As was the case under the Weimar Constitution, amendment requires passage of a formal statute by

92. *Protocol on Justice* arts. 10-16. [1954] BUNDESGESETZBLATT pt. 2, at 392-93.

93. EDC Treaty art. 66.

94. [1954] BUNDESGESETZBLATT pt. 2, at 78-134.

95. N.Y. Times, Sept. 7, 1953, p. 1, col. 8; *id.*, Sept. 8, 1953, p. 1, col. 4.

96. The opposition retained Lower Saxony (five votes), Hessen (four votes), and Bremen (three votes).

97. The text of article 79 is:

a two-thirds majority in both Federal Assembly and Federal Council. But the Basic Law adds two new procedures. First, article 79(1) makes it mandatory that the amending statute formally change the text of the apposite Basic Law articles. This provision is hardly intelligible to foreign lawyers because it seems self-evident. Its purpose is to forestall a repetition of the abuses of the Weimar amendment procedure, where it had become customary to effect constitutional amendments by statute passed by qualified majorities without recording the change in the text of the constitution itself. This convenient technique was often used by irresponsible *ad hoc* majorities to make exceptions, in an individual case, to constitutional rules which on their face remained intact (*Verfassungsdurchbrechung*). Though persistently attacked on doctrinal grounds, the process of "perforating" the constitution without changing its text was tolerated by parliamentary practice. As a result within the short life-span of Weimar the text of numerous articles failed to correspond to their actual validity. This, in turn, greatly weakened the prestige of the constitution as fundamental law superior to ordinary legislation. Though the precise number of such "perforations" was never officially established it ran into several scores.[98]

The second innovation of the amending procedure of the Bonn instrument is to insulate certain fundamental principles of the Basic Law from any change

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"(1) The Basic Law can be amended only by a statute which explicitly changes or implements the text of the Basic Law.

"(2) Such a statute shall require the approval of two-thirds of the members of the Bundestag [Federal Assembly] and two-thirds of the votes of the Bundesrat [Federal Council].

"(3) An amendment to this Basic Law by which the organization of the Bund [Federal Republic] into Laender, the basic principle of the participation of the Laender in legislation, or the principles contained in Articles 1 and 20 are affected, is inadmissible."

Article 1 refers to the "inviolate" "dignity of man" and proclaims adhesion of the German people to the "inalienable" human rights. Article 20 establishes the German Federal Republic as a democratic and social state under the rule of law, declares that all state power emanates from the people, and creates a distribution of functions among federal organs.

98. See LOEWENSTEIN, ERSCHEINUNGSFORMEN DER VERFASSUNGSAENDERUNG (1931) (a monograph on constitutional amendment much referred to during the controversy). See also Loewenstein, *The Government and Politics of Germany*, in GOVERNMENTS OF CONTINENTAL EUROPE 432-34 (Shotwell rev. ed. 1952). The situation has no parallel in other countries. The vast majority of amendments to the Constitution of 1874 of the Swiss Confederation pertain to the enlargement of enumerated federal powers. Under the Belgian Charte of 1831 a parliamentary statute carried by simple majorities may occasionally be in conflict with the text of the constitution, but the courts have never challenged it because of the absence of judicial review. Altogether fourteen such cases in Belgium since 1851 are mentioned by Ganshof van der Meersch, *De l'influence de la Constitution dans la vie politique et sociale en Belgique*, 6 REVUE DE L'UNIVERSITÉ DE BRUXELLES (N.S.) 169 (1954). In this country formal constitutional amendments are rare because the Supreme Court, by interpretive adjustment of the verbal formulations of the constitutional text to changing social conditions, performs some of the functions of the amendment process.

whatsoever even by formal constitutional amendment.[99] These unalterable provisions refer to the federal structure, the participation of the Laender in the legislative process, the principles of the dignity of man, and the principle of the state under rule of law (*Rechtsstaat*) as laid down in articles 1 and 20. Unhappily, but perhaps inevitably, these *noli me tangere* are not concrete and specific articles, but general principles subject to different interpretation.[100]

The Constitutional Amendment of March 26, 1954: Passage

On December 4, 1953, two of the coalition parties set the amendment machinery in motion by submitting to the Federal Assembly a draft constitutional amendment which added to article 73 a "clarificatory" provision that federal powers included jurisdiction over the military establishment, with the power to introduce universal military service for all men eighteen years of age.[101] This textual amendment, filling the gap so conspicuous in the Basic Law, met the demand of the opposition for an explicit assignment of military powers to the Federal Government and placed on solid ground the right to transfer military forces to an international organization under article 24(1).

However, an additional measure had to be taken to overcome the opposition's objections that the treaties and the conventions attached to them contained numerous deviations from the Basic Law which would likewise have to be passed by qualified majorities and recorded textually in the document. The Government would have found it very difficult and politically inopportune—to say nothing of aesthetic awkwardness—to record in the text of the Constitution these deviations from articles otherwise remaining intact. To circumvent this embarrassing situation the constitutional amendment inserted an ingenious escape-clause into article 79(1): In the case of a peace treaty, a treaty dismantling an occupation regime, or a treaty for the defense of the Federal Republic, deviations from the Constitution contained therein need not be textually recorded in the Basic Law; instead it is sufficient to add to the Basic Law a "clarificatory statement" (*Klarstellung*) that the provisions of the Basic Law do not prevent the conclusion and entering into force of the treaty. In other words, any deviations from the Basic Law in a treaty of the specific kind are legalized by declaring that they are not in conflict with the Constitution. Pursuant to this provision the constitutional amendment proposed a new article, 142a, to be inserted into the Basic Law stating simply that the provisions of the Basic Law do not prevent the conclusion and entering into force of the EDC and Bonn Treaties together with their conventions and protocols.[102]

99. BASIC LAW art. 79(3). See note 97 *supra*.

100. Such unalterable provisions inaccessible even to the formal amending process are not altogether uncommon in constitutions. See, *e.g.*, FRANCE CONST. OF 1946 art. 95; NORWAY CONST. OF 1814 art. 112. U.S. CONST. art. 6, cl. 3 may also be mentioned here.

101. DRUCKSACHEN DES BUNDESTAGES, 2. WAHLPERIODE Nos. 124, 125.

102. The Protocol of July 26, 1952, [1954] BUNDESGESETZBLATT pt. 2, at 340-41, about which the parliamentary bodies were ignorant when voting on the treaty bills, was specifically mentioned in the new article 142a.

Swift passage of the constitutional amendment by the legislative assemblies was a foregone conclusion. On February 26, 1954 the Federal Assembly passed it in the third reading with the requisite two-thirds majority.[103] The Federal Council rejected a motion to submit the matter to a reconciliation committee of the two houses [104] and passed the amendment by the requisite majorities with one Land (Hessen) dissenting from the entire amendment, one (Bremen) abstaining from the vote on extension of federal jurisdiction to military matters, and two (Lower Saxony and Bremen) abstaining from the vote on the exemption of inconsistent treaty provisions from the requirement of insertion into the text of the Basic Law.[105] Despite the substantial vote in favor of the amendments, serious doubts about their constitutionality were raised by dissenting Land representatives and by others.[106] The amendment entered into force on March 27, 1954.[107]

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103. SITZUNGSBERICHTE DES 2. DEUTSCHEN BUNDESTAGES, 17th Sess., 552A-83A (1954); DRUCKSACHEN DES BUNDESTAGES, 2. WAHLPERIODE No. 275 (1954). The vote was 334 to 144, with seven members excused. The coalition parties voted as solidly in favor as the opposition against, and the two-thirds requirement was exceeded by nine votes.

104. Such committees are authorized by BASIC LAW art. 77(2).

105. 120. *Sitzung des Bundesrats*, of March 19, 1954, SITZUNGSBERICHTE 59C-60A; BUNDESRATS-DRUCKSACHEN Nos. 68/54, 68/1/54.

106. See 120. *Sitzung des Bundesrats* of March 19, 1954, SITZUNGSBERICHTE pp. 54C-60A.

107. Law of March 26, 1954, [1954] BUNDESGESETZBLATT pt. 1, at 45.

The increasing awareness of many nations since World War II of the importance of closer international co-operation is reflected in alterations of their constitutions, which like BASIC LAW art. 24(1) and the amendment of March 26, 1954, permit the transfer of sovereign powers to international organizations without constitutional amendment. These provisions may be the first step in the breakdown of traditional, isolated state sovereignties and the transition to a confederal system and eventually to a genuine federal union. See Loewenstein, *Sovereignty and International Cooperation*, 48 AM. J. INT'L L. 222 (1954). Both the French and the Italian constitutions authorize transfer of sovereign rights by simple majority vote of the legislature and contain provisions similar to BASIC LAW art. 24(1). FRANCE CONST. OF 1946 preamble; ITALY CONST. OF 1947 art. 11. French jurisprudence accepts the doctrine that international law and international treaties may override domestic constitutional law. See, *e.g.*, PINTO, ELEMENTS DE DROIT CONSTITUTIONNEL 389 *et seq.* (1954); MIRKINE-GUETZÉVITCH, DROIT CONSTITUTIONNEL INTERNATIONAL c. 5 (1933); Scelle, *La Prétendue Inconstitutionalité Interne des Traités*, 68 REVUE DU DROIT PUBLIC 1012 (1952). The Danish constitution authorizes the delegation to international bodies of public powers held by state authorities provided the transfer is adopted by a five-sevenths majority of the single chambered legislature or, that failing, by a referendum of the people. DENMARK CONST. OF 1953 arts. 20, 42. See Ribert, *Danemark, La Constitution du 5 juin 1953*, 70 REVUE DU DROIT PUBLIC 64 (1954). In order to participate in the Coal and Steel Community, the Netherlands amended its constitution to permit transfer of sovereign rights with the consent of two-thirds of the two parliamentary houses but without the dissolution of parliament and confirmation by a newly elected parliament as is required for constitutional amendment. STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN, No. 247, May 8, 1952. In Belgium the Christian Social Government, fearful that its slim majority would be lost in the general elections required to effect a constitutional amendment, put off amendment at the time of the adoption of the Schuman plan against strenuous legal objection. See Ganshof van der Meersch, *Le Plan Schuman et la Con-*

The next and final move was up to the Federal President. With the adoption of the constitutional amendment the last barrier to his signing the treaties was removed. The amendment released him from his commitment to the leader of the opposition not to sign until the Court had passed on the constitutionality of the treaties, and on March 26, 1954, the President attached his signature to the treaties.

Under the Occupation Statute any amendment to the Bonn Constitution required the approval of the High Commissioners of the United States, the United Kingdom, and France, and any treaty with foreign powers could be rejected by the High Commission within twenty-one days after its submission to the Commission.[108] On March 25, 1954, the High Commission approved the constitutional amendment with a proviso, requested by France, that German rearmament be postponed until all states participating in EDC had ratified it.[109] The other sections of the constitutional amendment, being matters of strictly domestic concern, were approved unconditionally. The treaties themselves were, of course, not objected to.

The Constitutional Amendment of March 26, 1954: Legality

Beginning with the publication of the draft constitutional amendment the opposition fired broadside after broadside of briefs at the Court, sustaining all previous substantive objections to the treaties and claiming, in addition, that the constitutional amendment itself was unconstitutional.[110] In fact, its legality is subject to grave doubts.

The Government's attempt to disguise a constitutional amendment adding military powers to federal jurisdiction as an innocent "clarification" or

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stitution Belge, 4 REVUE DE L'UNIVERSITÉ DE BRUXELLES (N.S.) 5 (1951-52); Ganshof van der Meersch, *La Constitution Belge et l'Evolution de l'Ordre International*, 12 ANNALES DE DROIT ET DE SCIENCE POLITIQUE 33 (1952). But with the advent of EDC a constitutional amendment could no longer be evaded. A proposal to amend the BELGIUM CHARTE OF 1831 arts. 25, 68 to permit the transfer of powers, particularly the military, to international organizations was accepted by the legislature in March 1954; general elections were held April 11, 1954, and confirmation by the new parliament is safely to be expected in the near future. See Orban, *L'intégration Européenne et la révision de la Constitution Belge*, 4 REVUE INTERNATIONALE D'HISTOIRE POLITIQUE ET CONSTITUTIONELLE (N.S.) 21 (1954). No corresponding constitutional amendment was passed in Luxemburg, though the Conseil d'Etat recommended it. See 2 WEHRBEITRAG 390.

The situation in the United States is in startling contrast to the European movement toward opening constitutional portals to international integration. The controversy over the Bricker amendment indicates an increasing desire to immunize our national sovereignty against intrusions by international organizations. See Loewenstein, *supra*.

108. Occupation Statute of May 12, 1949, as revised March 6, 1951, art. 5, OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY 13 (1949); as revised *id.* at 792 (1951).

109. Decision No. 29 of March 25, 1954, OFFICIAL GAZETTE OF THE ALLIED HIGH COMMISSION FOR GERMANY 2864 (1954).

110. Legal objections to a constitutional amendment in the United States have been raised but rarely, and never have been sustained by the Supreme Court. See Leser v. Gar-

"authentic interpretation" seems a transparent political maneuver. The Government was understandably reluctant to concede to the opposition that an *antecedent* constitutional amendment was indispensable for integrating Germany's military potential into EDC. But there was more to it. By labelling the addition a mere clarification and thereby implying that disposition of military forces had been a federal power from the beginning, the Government hoped to knock the legal props from under the suit still pending before the Court. In short, it sought to give a constitutional amendment retroactive force.[111] The opposition argued—and it seems with a good deal of reason—that article 142a, legalizing the unconstitutional provisions of the EDC treaties, was also retroactive and as such violated the Basic Law. It is true that the Basic Law enshrined only a prohibition against ex post facto penal law.[112] But a fortiori this prohibition should apply to constitutional provisions, for the non-retroactivity of fundamental legal norms is a basic principle of the state under the rule of law. Comparative constitutional jurisprudence fails to record a single instance in which a constitutional norm has been made retroactive.[113]

It is granted that, by constitutional amendment, judicial review of certain categories of legislative acts could be withdrawn from the Constitutional Court, or judicial review as an institution abolished altogether. But no such withdrawal, by a mere statement of the qualified majorities, could be made for an individual controversy which is pending sub judice. Such an action is a clear violation of article 101(1) of the Basic Law which protects everyone against a denial of the right to appear before "his lawful judge." In order to withdraw the exempted category of international treaties from judicial review, the legislature, in conformity with article 79(1), would have had to write an explicit exception into the general rule of article 93(2), which assigns to the Court *all* disputes over the constitutionality of federal law. Had the

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nett, 258 U.S. 130 (1922) (19th Amendment); National Prohibition Cases, 253 U.S. 350 (1920) (18th Amendment).

German constitutional lawyers were curiously reticent about the legality of the amendment. *But cf.* Curtius, *Die Verfassungsnovelle vom 26. Maerz 1954 und die Schranken der Verfassungsrevision*, 7 DIE OEFFENTLICHE VERWALTUNG 623 (1954); Ehmke, *Verfassungsaenderung und Verfassungsdurchbrechung*, 79 ARCHIV DES OEFFENTLICHEN RECHTS 385, 410-18 (1954); Grewe, *Betrachtungen*, DEUTSCHES VERWALTUNGSBLATT 114 (1954); Loewenstein, *Kritische Bemerkungen zur Verfassungsaenderung vom 26. Maerz 1954*, 7 DIE OEFFENTLICHE VERWALTUNG 385 (1954); Sternberger, *Aus dem Bundesrat; Annahme mit Nuancen*, DIE GEGENWART 196 (1954). The author submitted a legal opinion on the validity of the constitutional amendment to the Court, which was attached to the opposition's brief of June 8, 1954.

111. In its original version the amendment revealed its retroactive character even more openly in that its entering into force was backdated to March 1, 1953, to emasculate the arguments of the opposition and destroy the jurisdiction of the Court over their petition. But the coalition parties thought it wise to camouflage their intention in more general phraseology.

112. BASIC LAW art. 103(2).

113. *Cf.* Giese, *Koennen Verfassungsgesetze sich rueckwirkende Kraft beilegen?*, 7 DIE OEFFENTLICHE VERWALTUNG 321-24 (1954).

constitutional amendment, therefore, amended article 93(2) to state that the Court has jurisdiction "in cases of differences of opinion or on the formal and material compatibility of federal law or Land law with this Basic Law, *with the exception of specified types of international treaties*," the withdrawal of such treaties from the jurisdiction of the Court would have been constitutionally unobjectionable, at least as to future cases. This textual change, however, was strangely omitted. Article 142a, thus, in itself is a violation of the binding rule of article 79(1) that constitutional amendments must be written into the text of the Basic Law.

Moreover, Article 142a is at variance with the principle of the separation of functions [114]—an unalterable provision of the Basic Law.[115] By declaring that the provisions of the Basic Law do not stand in the way of the EDC treaties, the Parliament resolved a case then pending before the Court instead of allowing it to proceed to judicial decision. Thus the Parliament, under guise of a constitutional amendment, appropriated a judicial function reserved to the Court.[116]

Finally, the opposition in its briefs and through some of the legal opinions submitted on its behalf, argued that an individual exception to an otherwise valid constitutional norm, even if accepted by constitutional amendment and recorded in the text of the Constitution, is illegal per se. This objection was primarily directed at the amendment to article 79(1) which exempts certain international treaties from the provision that amendments can only be made by altering the text of the Basic Law, but it could be raised as well to article 142a.

The argument touches on one of the most controversial subjects of constitutional jurisprudence under both Weimar and Bonn.[117] A deviation, it is contended, in an individual case from a general constitutional norm is in conflict with the quality of the constitution as fundamental law ordering the community. Many opponents of such "perforation" of a constitutional rule refer to metajuridical speculation on the character of the constitution as a supra-positivist "decision," or, in more intelligible terms, they assert a moral authority in the document, which does not brook opportunistic deflections in individual cases. While this approach may find support in the fact that article 79(3) protects certain constitutional principles even against constitutional amendment, one may as easily conclude from 79(3) that all other provisions of the Basic Law are subject to constitutional amendment whether by abolition or alteration in all cases, or only by suspension in an individual case. For the positivist school there is no ground on which the constituent power can be

114. BASIC LAW art. 20(2).

115. *Id.* art. 79(3).

116. See Ehmke, *supra* note 110, at 412-13.

117. The literature under Weimar was substantial: see, *e.g.*, HAUG, DIE SCHRANKEN DER VERFASSUNGSREVISION (1947); LOEWENSTEIN, ERSCHEINUNGSFORMEN DER VERFASSUNGSAENDERUNG 164-90, 233-304 (1931); Curtius, *Book Review*, 79 ARCHIV DES OEFFENTLICHEN RECHTS 510 (1954). For the situation under Bonn, see Ehmke, *supra* note 110; EHMKE, GRENZEN DER VERFASSUNGSAENDERUNG (1953).

prevented from making exceptions to its own rules if duly recorded in the text of the Basic Law. Otherwise the constituent power might not be in a position to meet emergency situations where exceptions to constitutional rules may be imperative. All that is required by the Basic Law is that the exception be carried by a formal constitutional amendment and duly recorded in the text of the Basic Law.

The opposition also contended that the treaty bills were invalid despite whatever absolution the constitutional amendment provided. The treaty bills had been passed by the *first* Federal Assembly, but they remained constitutionally uncompleted during the lifetime of that body because the Federal President failed to sign and promulgate them.[118] It is a rule common to all states possessing democratic parliaments with recurrent elections that a bill not completed before the expiration of the legislative term of the parliament which passed it becomes defunct.[119] The elections of September 6, 1953, brought a new Federal Assembly into being, so that when the Federal President, with the counter-signature of the Government, later signed the treaty bills he disregarded the principle of the "discontinuity of legislative periods." The proper procedure would have been for the Government to submit the bills to the second Federal Assembly for repassage and then refer them to the President for signature and promulgation. But because world opinion had become restless and because the opposition could have delayed the bills for months in committee and in the plenary sessions, their resubmission was politically inopportune. The constitutional amendment declaring the bills passed by a defunct Parliament not to be violative of the Basic Law did not cure the defect caused by regarding Parliament as a continuous body.

To summarize the foregoing analysis of the constitutional amendment of March 26, 1954: The creation of a federal military power by amending the Basic Law is fully legal, and it provides a constitutional basis for transfer of military forces to international organizations under article 24(1). That part of the amendment which exempts certain international treaties in conflict with Basic Law from the requirement of textual recordation in the constitution is a *loi d'occasion*, perhaps reprehensible and unfortunate, yet not unconstitutional. But the new article 142a by which the Court was deprived ex post facto of its jurisdiction over questions of the constitutionality of the treaties, is clearly unconstitutional. Thus, the treaties themselves would seem not to have been ratified in accordance with the Basic Law, and, hence, were devoid of legal force.

The Aftermath of the Constitutional Amendment

After the constitutional amendment of March 26, 1954, had become effective and the Federal President had promulgated the treaties and thereby con-

118. BASIC LAW art. 82(1).

119. In addition to the unwritten practice of the United States and Great Britain, see the explicit provision in DENMARK CONST. OF 1953 art. 41(4).

verted them into the law of the land, the Government evidently felt that the case before the Court was dead. It even disdained answering the opposition's briefs except to contest the petitioners' right to continue the suit. This contention was not wholly devoid of merit. By Basic Law and statute, suit concerning the compatibility of federal law with the Basic Law can be brought by the Federal Government, a Land Government, or one-third of the membership of the Federal Assembly.[120] While the 144 members of the Assembly had constituted the requisite one-third when they filed their final petition on May 11, 1953, the 147 petitioners continuing the proceedings fell short of constituting one-third of the newly elected Assembly with 487 members. Moreover, not all of them were identical with the original petitioners. But, in the absence of a constitutional or a statutory provision, a constitutional controversy need not necessarily expire because the petitioners lose their capacity to file a new suit, and at any rate, it would seem the issue should be decided by the Court.

The Court, however, remained completely inactive, possibly for the same political reasons that the Government chose to ignore the pending case. By presidential promulgation the treaties had become final. Any subsequent invalidation by the Court of the treaties themselves or the constitutional amendment legalizing them,[121] would have reopened the Pandora's box of German ratification, a politically undesirable occurrence, the responsibility for which the Court understandably was indisposed to take. Consequently it procrastinated. This policy paid ample if anticlimactic dividends. When the French National Assembly failed to ratify, the proceedings before the Court together with the treaties became moot. At the time of this writing (April, 1954) the petition has not been withdrawn by the plaintiffs,[122] but there is not even a remote prospect of the case being decided by the Court on its substantive merits.

Similar questions were again before the Federal Constitutional Court in proceedings instituted by the opposition [123] challenging the constitutionality of the Saar Agreement,[124] an essential element of the network of treaties forming the Paris and London Accords, which are designed to replace

120. BASIC LAW art. 93(1) para. 2; Law on the Federal Constitutional Court § 76.

121. Because the Social Democratic Party no longer held one-third of the Assembly seats, it could not make a direct attack on the constitutionality of the amendment, but could only raise the issue collaterally in the pending controversy concerning the treaties.

122. Letter from Dr. Adolf Arndt, legal counsel for the plaintiffs, to Karl Loewenstein, Sept. 29, 1954, copy on file in Yale Law Library.

123. The petitioners reached the constitutionally required minimum of one-third of the total membership of the Federal Assembly when the 151 Social Democrats were joined by seven dissident Free Democrats, four members of the German Bloc and one Independent, not to mention the eleven Social Democrats from Western Berlin whose capacity to bring suit was doubtful in view of their status as mere observers in the Federal Assembly without voting rights under BASIC LAW art. 144(2).

124. The text of the Saar Agreement appears in N.Y. Times, Oct. 26, 1954, p. 4, cols. 1-5. The Agreement, along with the other treaties constituting the London and Paris

EDC.[125] Because of the constitutional amendment of March 26, 1954, no constitutional objection could be made to the central agreements of the new defense scheme, which will allow the rearmament of Western Germany and admit it into the Brussels Treaty of 1948 and into NATO. But the agreement between France and the German Federal Republic "Europeanizing" the Saar territory politically and integrating it economically with France was the object of several new attacks based on the Basic Law. The opposition contended that the Saar Agreement destroys the right of the Saarlanders, under article 23, to accede to the Basic Law at a future date. Moreover, in violation of article 146, the Agreement makes impossible the participation of Saarlanders in an all-German constituent assembly.[126] Finally, the Statute on the Saar Territory [127] was alleged to violate the European Convention for the Protection of Human Rights and Fundamental Freedoms [128] in providing that criticism of the Statute is permissible only during the three-month period preceding its ratification by referendum, and that after ratification no challenge of the Europeanized status of the territory can be made until the conclusion of a final peace treaty with Germany—an event which may never come. Since the Convention on Human Rights embodies "general rules of international law," it cannot, by Basic Law article 25, be modified by statute or treaty. However sound these objections were on their constitutional merits, the Court's task of sailing between the Scylla of relinquishing Germany's claim to the Saar and the Charybdis of sabotaging Germany's integration into the Western defense system was a difficult one. Its treatment of the EDC treaties stood as an ominous portent, and, as might have been expected, the Court on May 4, 1955, dismissed the petition of the opposition.[129]

EPILOGUE: A POST MORTEM

In this tournament of jurisprudential wits the Government and its lawyers won hands down. Every legal threat which placed in jeopardy the Govern-

Accords, were ratified by simple majorities of the Federal Assembly, acting on the assumption that no constitutional amendment was necessary. The Free Democrats joined the opposition in voting against the Agreement. N.Y. Times, Feb. 28, 1955, p. 1, col. 8. The Federal Council earlier decided that the treaties did not affect states' rights and hence did not require its formal approval, N.Y. Times, Dec. 1, 1954, p. 6, col. 3, and on March 18, 1955, passed the treaty bills by a substantial majority. N.Y. Times, March 19, 1955, p. 1, col. 6.

125. See S. EXEC. Doc. L & M, 83d Cong., 2d Sess. (1954). For analysis of the London and Paris Accords, see Kunz, *The London and Paris Agreements on West Germany*, 49 AM. J. INT'L L. 210 (1955); Bishop, *The "Contractual Agreements" with the Federal Republic of Germany*, *id.* at 125; Briggs, *The Final Act of the London Conference on Germany*, *id.* at 148.

126. BASIC LAW art. 146 preserves this right to all German nationals. *Id.* art. 116 defines German national broadly enough to include the Saarlanders.

127. DRUCKSACHEN DES BUNDESTAGES, 2. WAHLPERIODE, No. 1062 (1953).

128. For text, see 45 AM. J. INT'L L. 24-39 (Supp. 1951).

129. N.Y. Times, May 5, 1955, p. 1, col. 7.

ment's grand design for Germany's integration into Western defense was victoriously repulsed. Yet to one observer it seems that the Government won a Pyrrhic victory. Left injured on the battlefield are practically all protagonists. The opposition's right to be an effective opposition was frustrated. The political neutrality of the Federal President was damaged when he withdrew his request for an advisory opinion. The Federal Council suffered loss of prestige by its political meanderings. And finally, the Federal Constitutional Court and German constitutional democracy were losers.

There is no gainsaying that the Court was placed in a most difficult position. The issue that faced it was whether the Basic Law stood in the way of a policy decision of paramount importance, on which the Government, supported by an overwhelming majority of the Federal Assembly, had staked Germany's future. There was no doubt that under the Basic Law the case was justiciable. But in impartially applying the law the political responsibility of the judiciary was taxed beyond its limits. The Court was on safe legal ground when it refused to adjudicate before the enactment of the treaties by the parliamentary bodies had been completed. But what would have been the situation had the Court thereafter invalidated the treaties? A decision demanding a constitutional amendment—which at that time was unobtainable—would have stymied the Government's European policy. Public opinion in the West, particularly in the United States, would hardly have distinguished judicial morality from political ill-will.[130] Germany would have stood accused of torpedoing European solidarity. Moreover, an irate government and parliament, after the election victory of September, 1953, might not have hesitated to take its revenge and trim the Court's powers or abolish judicial review altogether. Perhaps it was the better part of valor for the Court to drag its feet and wait for the impending elections after which the issue could be resolved by constitutional amendment. Judiciously waiting, the judiciary saved its face and, perhaps, its neck.

And yet, with full understanding of the Court's quandary one may wonder if judicial restraint has not been bought too dearly. In the first major political test of its usefulness the Court has been found wanting. A great opportunity to live up to the expectations of the Basic Law was sacrificed to extrajudicial considerations.

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130. The international validity of a domestically unconstitutional treaty is a highly controversial subject. See, *e.g.*, BLONDEAU, LA SUBORDINATION DES CONSTITUTIONS AUX NORMES INTERNATIONALES (1932); COWLES, TREATIES AND CONSTITUTIONAL LAW (1941); MIRKINE-GUETZÉVITCH, DROIT CONSTITUTIONNEL INTERNATIONAL 164-66 (1933); Jenks, *The Present Status of the Bennett Ratification of International Labour Conventions*, 15 CAN. B. REV. 464 (1937). The American and Swiss practice upholds the validity of international treaties which contravene internal constitutional law, particularly the federal-state relations. United States v. Pink, 315 U.S. 203 (1942); Missouri v. Holland, 252 U.S. 416 (1920); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); 1 GIACOMMETTI, SCHWEIZERISCHES BUNDESTAATSRECHT 809 *et seq.* (1949); 1 GUGGENHEIM, LEHRBUCH DES VOELKERRECHTS 277 (1948).

This is all the more surprising since the Court, during the three years following its inauguration, consistently had grown in stature and was firmly on the way of fixing itself in the popular mind as the true custodian of Bonn's democratic values. Its jurisprudential authority, as evidenced by its previous decisions, need not fear comparison with any other high court.[131] Testimonials to its democratic courage are the decisions outlawing under article 21 of the Basic Law the neo-Nazi Socialist Reich Party [132] and the so-called "Article 131 decisions." The latter declared that all appointments of public officials had been terminated with unconditional surrender, that former Nazi officials did not have a right to be reinstalled in their former positions, and that their permanent dismissal does not violate the fundamental right of equality before the law.[133] With these decisions the Court boldly defied the hallowed tradition of the sacrosanct and vested rights of German officials and professional army officers to their office. Had the Weimar Constitutional Court exhibited in time the same democratic energy it is safe to say that Weimar would not have perished.

Why, then, has the Federal Constitutional Court so lamentably faltered? Possibly the failure should be attributed less to the Court than to the Bonn Constitution itself. Passing on the supreme policy decisions of the Government may exceed the judicial capacity of any court: in judicializing political power the Bonn instrument may have gone beyond reasonable limits. But the effects of the Court's delinquency or deficiency in acting as the constitutionally appointed guardian were not confined to the Court itself. The procedural treatment of this basic controversy hardly increased the respect of

131. See the excellent review of the work of the court during the first two years by Mercker, *Zwei Jahre Rechtsprechung des Bundesverfassungsgerichts*, BUNDESANZEIGER Nos. 206, 226, 243 (1953); No. 24 (1954). An authoritative review of the Court's activities until 1954 is presented by one of its members, Judge Federer, *Die Rechtsprechung des Bundesverfassungsgerichts zum Grundgesetz fuer die Bundesrepublik Deutschland*, 3 JAHRBUCH DES OEFFENTLICHEN RECHTS (Neue Folge) 15 (1954), with an extensive bibliography, *id.* at 58-66, and a discussion of the controversy treated here, *id.* at 50-53.

132. Judgment of Bundesverfassungsgericht (I. Senat), Oct. 23, 1952, 2 B.V.G. 1.

133. This right is guaranteed by BASIC LAW art. 3(1).

Altogether five parallel decisions (for different categories of office holders) were handed down on December 17, 1953. Judgments of Bundesverfassungsgericht (I. Senat), Dec. 17, 1953, 3 B.V.G. 58, 162, 187, 208, 213. The sixth decision applied the same principles to members of the armed forces. Judgment of Bundesverfassungsgericht (I. Senat), Feb. 26, 1954, 3 B.V.G. 288. The decisions, binding all other governmental organs including the courts (Law on the Federal Constitutional Court § 31) were violently attacked, even by a plenary decision of the Supreme Federal Court, the court of the last instance in non-constitutional matters. Judgment of Bundesgerichtshof (Grosser Senat fuer Zivilsachen), May 20, 1954, 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen 265. For a general appraisal of the resultant chasm in the German judiciary, see Peters, *Der Streit um die 131er Entscheidungen des Bundesverfassungsgerichts*, [1954] JURISTENZEITUNG 589. 589.

Seventeen legal opinions opposing the decisions of the Court are published in *Schriftenreihe des Deutschen Beamtenbundes, Sonderheft*, DIE WISSENSCHAFT ZUM SPRUCH VON KARLSRUHE (1954). See, also, Federer, *supra* note 131, at 57-58.

the burgher for his Basic Law and the democratic values it purports to embody, while it deeply embittered the eight million voters of the Social Democratic Party, about one-third of the total electorate. Once again, a willful government—*Obrigkeit* is the historic German term—supported by a majority in parliament, as obedient to the Chancellor as it was arrogant toward the minority, demonstrated to the German people that it could bend the Constitution at its will and get away with it. The situation is ominously reminiscent of Bismarck's conflict with the progressive majority of the Prussian diet in the 1860's when the chancellor of "blood and iron" treated the constitution as a scrap of paper and vindicated himself by winning two wars of aggression. *Vestigia terrent.*

But the melancholy story does not end there. The briefs and legal opinions submitted on behalf of the Government indicate that official constitutional jurisprudence has assumed a familiar German role. Seeking to prove that rearmament is legal without constitutional amendment, the ministerial bureaucracy and its bevy of legal experts went far beyond what the *ars argumentativa* of the advocate of a just cause could have warranted. Again the authoritarian nature of German constitutional tradition, its secret yearning for the strong government, its penchant for a state mystique above the positive law, broke through the paper thin veneer of democratic convictions to which lip service is paid. The very structure of the Bonn Constitution, demo-authoritarian at best,[134] gave full rein to the belief that the Government can do no wrong. By any democratic standards, this revealing self-portrait of official constitutional jurisprudence is unattractive. Its only redeeming feature is the opposition's honest belief that, if democratic fundamentals are to be taken seriously, all government must be strictly limited government, and the Constitution the supreme law of the land.

The ultimate consequences which this monumental case of judicial frustration will have for the democratic future of Germany are hard to foresee. While it lasted, the controversy aroused intense public interest. Possibly, the notorious indifference of the German people towards the Basic Law will, in the long run, cancel out the potential injury the Constitution has suffered. Possibly, however, this precedent of converting expediency into law will constitute again the entering wedge for governmental authoritarianism for which the Constitution serves as a cloak rather than a brake.

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134. See Loewenstein, *The Government and Politics of Germany*, in GOVERNMENTS OF CONTINENTAL EUROPE 580 (Shotwell rev. ed. 1952).